72-573 FILE COPY

FILED

OCT 10 1972

MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-573

CHARLES K. MARSH, Petitioner

v.

HORACE V. CURRY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ERNEST F. SMITH
F. ALLAN KELLY and
HUNTER, SMITH, DAVIS, NORRIS
WADDEY AND TREADWAY
Post Office Box 3740
Kingsport, Tennessee 37664

INDEX

Page

Opinion below 1
Jurisdiction 2
Questions presented 3
Statutory provisions involved 3
Statement of the case 3
Reasons for granting the writ
1. A Substantial Federal Question Exists Concerning Whether Specific Intent Is A Necessary Element In A Cause of Action Under 42 U.S.C. § 1983 5
2. The Decision Below Conflicts With The Decisions Of Other Courts Of Appeals As To The Standard Of A Good Faith Defense Under 42 U.S.C. § 1983 7
Conclusion 10
Appendix A A1
Appendix B A4

CITATIONS

Cases

Adams v. Pate, 445 F.2d 105 (7th Cir. 1971) 9

Bauers v. Heisel, 361 F.2d 581 (3rd Cir. 1966) 7

Cobb v. City of Malden, 202 F.2d 701 (1st Cir. 1953) 7

Crawley v. Warren, 216 F.2d 74 (7th Cir. 1954) 7

Cuikas v. City of Mansfield, 230 F.2d 700 (6th Cir.) *cert. denied*, 356 U.S. 937 (1958) 7

Curry v. Gillette, 461 F.2d 1003
(6th Cir. 1972) 8,9

Dale v. Hahn, 440 F.2d 633
(2d Cir. 1971) 7,8

Daniels v. VandeVenter, 382 F.2d 29
(10th Cir. 1967) 6

Donovan v. Reinbold, 433 F.2d 738
(9th Cir. 1970) 7

Flemming v. Adams, 377 F.2d 975
(10th Cir. 1967) 7

Francis v. Crafts, 203 F.2d 809 (1st Cir.)
cert. denied, 346 U.S. 835 (1953) 7

Freeman v. Gould Special District, 405 F.2d 1153
(8th Cir.) *cert. denied*, 396 U.S. 843 (1969) 7,9

Jenkins v. Meyers, 338 F. Supp. 383
(N.D. Ill. 1972) 6

Jennings v. Davis, 339 F. Supp. 919
(W.D. Mo. 1972) 9

Joseph v. Rowlen, 402 F.2d 367
(7th Cir. 1968) 6

Jones v. Hooper, 410 F.2d (10th Cir)
cert. denied, 397 U.S. 991 (1969) 8,9

Kenny v. Fox, 232 F.2d 288 (6th Cir)
cert. denied, 352 U.S. 855 (1956) 7

Kish v. City of Milwaukee, 441 F.2d 901
(1st Cir. 1970) 9

Kletschka v. Driver, 411 F.2d 436
(2d Cir. 1964) 7,8

Lynch v. Johnson, 420 F.2d 818
(6th Cir. 1970) 7

McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968) 9

McGuire v. Todd, 198 F.2d 60 (5th Cir.) *cert. denied*, 344 U.S. 833 (1952) 7

Monroe v. Pape, 365 U.S. 167 (1961) 5,7

Nelson v. Knox, 256 F.2d 312 (6th Cir. 1958) 8

Pierson v. Ray, 386 U.S. 547 (1967) 5,7

Silver v. Dickson, 403 F.2d 642 (9th Cir. 1968) 7,8

Smith v. Board of Education of Morrilton School District No. 32, 365 F.2d 770 (8th Cir. 1966) 9

Snowden v. Hughes, 321 U.S. 1 (1943) 5

Stift v. Lynch, 267 F.2d 237 (7th Cir. 1959) 7

Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) 6

Tate v. Arnold, 223 F.2d 782 (8th Cir. 1955) 7

Tenny v. Brandlove, 341 U.S. 367 (1951) 7

Whirl v. Kern, 407 F.2d 781 (5th Cir. 1969) 6

IN THE

SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1972

No. _____

CHARLES K. MARSH, Petitioner

v.

HORACE V. CURRY, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Charles K. Marsh, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on June 14, 1972.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit appears in 361 F.2d 1003 (6th Cir. 1972), and is reprinted in the Appendix hereto. The opinion of the United States District Court for the Eastern District of Tennessee is not reported. It is reprinted in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 14, 1972. A timely petition for rehearing was denied on August 14, 1972 and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether a municipal officer acting under color of state law must specifically intend to discriminate against one seeking municipal aid to preclude an immunity defense by the city official under the Civil Rights Act, 42 U.S.C. § 1983?
2. Whether the federal judiciary should use an objective standard in determining whether good faith exists on the part of a municipal officer seeking immunity from the Civil Rights Act, 42 U.S.C. § 1983?

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, Title 42

§ 1983 Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

TENNESSEE CODE ANNOTATED, Title 6

§ 642 Ambulance Service defined

For the purpose of §§ 6-642 -- 6-645 the term "ambulance service" shall mean the use of any privately or publically owned motor vehicle for the transportation of injured or infirm persons on an emergency or nonemergency basis.

§ 644 Provision of Private or Nonprofit Ambulance Service – Regulations

The governing body of any county or city may license, franchise, or contract for private operations or non-profit general welfare corporations to provide ambulance service. In order to protect the public health and welfare, any county or city may adopt and enforce reasonable regulations to control the provision of private or nonprofit ambulance service.

STATEMENT OF THE CASE

Petitioner prays for a writ of certiorari to issue to the Sixth Circuit Court of Appeals to review its final judgment affirming the decision of the District Court for the Eastern District of Tennessee. The original action was brought pursuant to 28 U.S.C. § 1343 based on federal questions raised under 42 U.S.C. §§ 1981, 1983, and 1985 and the Fourteenth Amendment. The federal question was raised when the city of Kingsport, Tennessee subsidized Wright S. Johnson, proprietor of Metro Ambulance Service and a member of the Caucasian race while refusing to monetarily subsidize Horace V. Curry, a Negro, owner and operator of Curry's Mortuary. Mr. Curry, plaintiff, alleged that the decision of the Board of Mayor and Alderman and the City Manager to subsidize Metro was racially motivated and denied plaintiff's right to equal protection under color of state law. In a memorandum decision the District Court held the Board of Mayor and Alderman and the City Manager had deprived Mr. Curry of his right to equal protection because of his race by (1) authorizing Metro Ambulance Service to temporarily use City Fire Hall No. 2; (2) encouraging members of the public to use Metro, when like treatment was not extended to Curry; and (3) making temporary subsidy payments to Metro in the amount of $1900.00. The Sixth Circuit affirmed in a per curiam opinion.

Since 1967, the City of Kingsport, Tennessee has

experienced trouble in obtaining adequate emergency ambulance service to protect the health and welfare of its citizens. On June 13, 1967, the Board of Mayor and Aldermen (hereinafter the Board), acting pursuant to Tennessee Code Annotated 6-644, adopted an ordinance regulating private ambulance service in Kingsport.

Mr. Horace V. Curry, respondent, operated Curry's Mortuary and applied for and was issued certificates of convenience and necessity for two ambulances and one spare. On the same date, July 4, 1967, Tri-Cities Ambulance Service was issued certificates of public convenience and necessity on four ambulances and one spare.

On February 10, 1969, the Board learned, without notice, that Tri-Cities Ambulance Service had ceased operation. At a Board meeting called that day, Metro Ambulance Service under the direction of Wright S. Johnson was issued certificates for public convenience and necessity on four ambulances and one spare. After losing its leased premises and being unable to arrange permanent quarters complying with the City's ambulance ordinance, Metro requested and was granted permission, renewable each 30 days, to operate out of Kingsport Fire Hall No. 2. On September 16, 1969, Metro notified the Board that unless it could obtain economic support by the City and Sullivan County, it would withdraw its four ambulances and cease operation. The same day, the Board met and passed a resolution agreeing to enter into a joint agreement with Sullivan County to pay Metro for hauling indigent patients. Subsequently, the Board authorized a $400.00 per month payment for October, November and December, 1969. Curry had not yet requested monetary stipends. Curry queried the City Manager whether the subsidy would apply to his firm and was told that it would not, since to pay a joint mortuary-ambulance service would likely bring other funeral homes back into the ambulance service. Unable to operate efficiently without a subsidy, Metro requested and received

further funds of $400.00 per month for the months of January and February. The City conditioned the subsidy on agreement of Metro to service only City residents. On February 20, 1970, after receiving $700.00 of the authorized funds, Metro ceased operation of its business.

Since that time, the City of Kingsport and subsequently Sullivan County has provided emergency ambulance service as a governmental function.

REASONS FOR GRANTING THE WRIT

A substantial Federal question exists concerning whether specific intent is a necessary element in a cause of action under 42 U.S.C. § 1983.

A conflict of authority has arisen between the appellate and district courts concerning the necessity in maintaining a section 1983 action of plaintiff establishing a purposeful intent on the part of the defendant to deny a constitutionally secured right under color of law. The confusion has arisen from the general language in *Snowden v. Hughes*, 321 U.S. 1 (1943), and the tort analogy to section 1983 in equal protection cases issued in *Monroe v. Pape*, 365 U.S. 167 (1961). *Snowden* held that the unlawful administration by state officers of a statute fair on its face resulting in discrimination was not a denial of equal protection unless there was shown an element of "intentional and purposeful discrimination". 321 U.S. 1 at 8, 9.

Monroe modified Snowden by holding that the federal courts, when analyzing an immunity defense under the Civil Rights Acts, should apply tort law requiring a man to be held liable for the natural consequences of his actions.

As a consequence of these decisions and *Pierson v. Ray*, 386 U.S. 547 (1967), holding police officers acting under color of law in good faith are immune under the Civil Rights Act, the federal bench has had a difficult time of accommodating the Civil Rights Act, 42 U.S.C. § 1983, with the body of common law torts which the Supreme Court mandated in *Monroe*.

Specifically, a dispute has arisen concerning the necessity of plaintiff establishing that defendant acted with an improper motive or in bad faith under color of state law depriving plaintiff of a constitutionally secured right.

The Tenth Circuit in *Stringer v. Dilger*, 313 F.2d 536 (10th Cir. 1963), and in *Daniels v. Van de Venter*, 382 F.2d 29 (10th Cir. 1967), had held that specific intent is not an element in a cause of action under section 1983.

The Court of Appeals in *Jenkins v. Averett*, 424 F.2d 1228 (4th Cir. 1970), has held that the intent necessary under section 1983 may be supplied by common law gross or culpable negligence on the part of the official acting under color of state law.

The Fifth and Seventh Circuits have found intent is not an element in a cause of action under section 1983. *Whirl v. Kern*, 407 F.2d 781 (5th Cir. 1969); *Joseph v. Rowlen*, 402 F.2d 367 (7th Cir. 1968).

In *Jenkins v. Meyers*, 338 F. Supp. 383 (N.D. Ill. 1972), the district court concluded that an element of intent is necessary under section 1983. After examining the intent cases, it determined that a common thread existed in all the cases of the defendant either specifically intending to discriminate or intending the act and the result of the act which lead to the deprivation of the plaintiff's constitutionally secured right. The Illinois District Court concluded that a third class of cases existed which involved a conscious act resulting in a deprivation of constitutional rights but where an improper motive was absent. The *Jenkins* Court found, in such cases, that a section 1983 cause of action existed but that the common law defense of good faith also applied. The Court thus reasoned that specific intent or improper motive was in fact an element in a section 1983 cause of action, and without the intent, the action would not lie.

The decision below conflicts with the decisions of other Courts of Appeals as to the standard of a good faith defense under 42 U.S.C. § 1983.

Title 42, section 1983, provides that every person acting under color of law who deprives another of any rights, privileges or immunities secured by the Constitution shall be civilly liable in damages or equitable relief for the injury sustained. An exception to section 1983 has been sustained by the judiciary officials acting under color of law. *Pierson v. Ray*, 386 U.S. 547 (1967); *Monroe v. Pape*, 365 U.S. 167 (1961); *Tenny v. Brandlove*, 341 U.S. 367 (1951); *Dale v. Hahn*, 440 F.2d 633 (2d Cir. 1971); *Donovan v. Reinbold*, 433 F.2d 738 (9th Cir. 1970); *Lynch v. Johnson*, 420 F.2d 818 (6th Cir. 1970); *Kletschka v. Driver*, 411 F.2d 436 (2nd Cir. 1964); *Freeman v. Gould Special School Dist.*, 405 F.2d 1153 (8th Cir.) *cert. denied* 396 U.S. 843 (1969); *Silver v. Dickson*, 403 F.2d 642 (9th Cir. 1968); *Flemming v. Adams*, 377 F.2d 975 (10th Cir. 1967); *Bauers v. Heisel*, 361 F.2d 581 (3rd Cir. 1966); *Stift v. Lynch*, 267 F.2d 237 (7th Cir. 1959); *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958); *Cuikas v. City of Mansfield*, 250 F.2d 700 (6th Cir. 1957) *cert. denied* 356 U.S. 937 (1958); *Kenny v. Fox*, 232 F.2d 288 (6th Cir.) *cert. denied* 352 U.S. 855 (1956); *Tate v. Arnold*, 223 F.2d 782 (8th Cir. 1955); *Crawley v. Warren*, 216 F.2d 74 (7th Cir. 1954); *Cobb v. City of Malden*, 202 F.2d 701 (1st Cir. 1953); *Francis v. Crafts*, 203 F.2d 809 (1st Cir.) *cert. denied*, 346 U.S. 835 (1953); *McGuire v. Todd*, 198 F. 2d 60 (5th Cir.) *cert. denied*, 344 U.S. 835 (1952).

A substantial conflict among the United States Appellate Courts has arisen concerning when the good faith defense will be applicable and how the good faith should be measured.

The Eighth Circuit has held valid a good faith defense whenever an administrative body must exercise discretionary power under color of law. *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir.) *cert. denied*, 396 U.S. 843 (1969). The Tenth Circuit has reached a similar conclusion.

Jones v. Hooper, 410 F.2d (10th Cir.) *cert. denied*, 397 U.S. 991 (1969). The Second Circuit has not followed such a line of reasoning, but rather has engaged in a balancing process, seeking to accommodate the administrative body's function and the effect immunity will have on the power of the agency with the purpose of the Civil Rights Act. *Dale v. Hahn*, 440 F.2d 633 (2d Cir. 1971); *Kletschka v. Driver*, 411 F.2d 436 (2d Cir. 1969).

The Ninth Circuit had adopted an approach similar to the Eighth Circuit. In *Silver v. Dickson*, 403 F.2d 642 (9th Cir. 1968), plaintiff, a prisoner in the California penal system, alleged the California Adult Authority had engaged in arbitrary and discriminatory conduct in passing on his parole application. The Ninth Circuit found that defendants were performing a quasi-judicial function which entitled them to immunity from suits under the Civil Rights Act. The Court noted, however, that even if the California Adult Authority were not performing quasi-judicial functions, it was exercising a governmental function requiring discretionary conduct necessitating immunity from damages under the Civil Rights Act. The "governmental-discretionary" reasoning is based upon a finding that governmental bodies must be able to act for the general welfare of the public; to meet and act decisively, albeit in good faith, without fear of being held individually liable in monetary damages. Such immunity is viewed as the natural extension of sovereign immunity.

The Sixth Circuit's opinion in *Curry v. Gillette*, 461 F.2d 1003 (6th Cir. 1972), neither conforms with the above applications or the past decisions of that Circuit. *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958). The *ratio decidendi* in *Curry* was basically one that petitioner did not exercise in good faith, and therefore immunity was not appropriate. The Court of Appeals reached its decision concerning lack of good faith by noting punitive damages were awarded. Equating punitive damages with bad faith, the Court passed upon Marsh's immunity plea. The Court of Appeals specifically disregarded

the District Court's findings that the defendants below acted in good faith and without willful intent.

The United States Courts of Appeals have not used a uniform standard to determine what constitutes good faith. In *Smith v. Board of Education or Morilton School District No. 32*, 365 F.2d 770, (8th Cir. 1966), and *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968), the courts are using an objective standard to determine good faith. These courts have looked to the conflict, the testimony of the defendants, the defendant's background and the surrounding circumstances to determine whether good faith existed. Yet in *Freeman v. Gould Special School District*, 405 F.2d 1153 (8th Cir.) *cert. denied* 396 U.S. 843 (1969), and *Jones v. Hooper*, 410 F.2d (10th Cir.) *cert. denied*, 397 991 (1969), the Courts have willingly accepted the testimony of the defendant as proof of good faith and refused to look further into the action of the administrative body. In *Curry v. Gillette, supra*, the Sixth Circuit seems to be engaging in an overly objective approach, disregarding defendants claimed intentions and the need for discretionary power, free from restraint, which city officials must possess in order to run an efficient government, serving all the people.

The Petitioner is not liable in damages for the actions of the independent city newspaper encouraging citizens to use the subsidized ambulance service, since the doctrine of Respondeat Superior is inapplicable to the Civil Rights Act.

It is well established that the common law doctrine of respondeat superior is inapplicable to the Civil Rights Act. Only one participating directly in the alleged constitutionally violative actions can be held liable under the Civil Rights Act, 42 U.S.C. § 1983. *Jennings v. Davis*, 339 F. Supp. 919 (W. D. Mo. 1972); *Adams v. Pate*, 445 F.2d 105 (7th Cir. 1971); *Kish v. City of Milwaukee*, 441 F.2d 901 (1st Cir. 1970).

Petitioner Marsh did not encourage or participate in the news releases announcing Metro's operation. He cannot be held liable for the actions of the independent city newspaper in

encouraging citizens to use the city subsidized service.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

Ernest F. Smith
F. Allan Kelley and
Hunter, Smith, Davis,
Norris Waddey & Treadway
P. O. Box 3740
Kingsport, Tennessee 37664
Counsel for Petitioner

October , 1972

APPENDIX

APPENDIX A

No. 71-1886

UNITED STATES COURT OF APPEALS

HORACE V. CURRY,
Plaintiff-Appellee,
v.
FRED GILLETTE, ET AL.,
Defendants-Appellants.

APPEAL from the United States District Court for the Eastern District of Tennessee, Northeast Division.

Decided and Filed June 14, 1972

Before: PECK and McCREE, Circuit Judges, and McALLISTER, Senior Circuit Judge.

PER CURIAM. This civil rights action was instituted under the provisions of 28 U.S.C. § 1343 and 42 U.S.C. §§ 1981, 1983 and 1985. Plaintiff sought and recovered damages in the District Court, but was denied injunctive relief. Defendants-appellants perfected this appeal from such allowance of damages. The parties will herein be referred to as they were in the trial court.

Plaintiff, a Negro, operated a funeral home and ambulance service in Kingsport, Tennessee, and the defendants are the City Manager and the Board of Mayor and Alderman of that municipality. Plaintiff alleged that he was a victim of discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment in that special favors and monetary aid had been afforded a white operator of an ambulance service.

The City of Kingsport determined that for 1969 and future years it would need a minimum of six ambulances to service its 35,00 residents. Plaintiff operated two such ambulances, and in February 1969 the white operator above referred to, doing business as the Metro Ambulance Service, was certified to operate four ambulances. However, when Metro

experienced problems the City agreed to allow it to use the fire hall rent free, provided advertising for Metro's service in the Kingsport newspapers, and subsequently agreed to grant a $400 per month subsidy to keep Metro in business. An application by plaintiff for a similar subsidy was denied. This suit followed, and the District Court found that defendants discriminated against plaintiff (1) by authorizing the white operator to use a city owned fire hall for his operation without cost to him, (2) by encouraging members of the public to use the white operator's ambulance service without affording similar assistance to plaintiff, and (3) by making subsidy payments to the white operator but not to plaintiff. It is initially observed, however, that the judgment is without record support as it pertains to the defendant Elery Lay, and on the remand hereinafter ordered the District Court is directed to enter judgment in favor of said defendant.

While the District Court made no finding in specific terms on the point, taking into account the record evidence of the fact that plaintiff was president of the local chapter of the National Association for Advancement of Colored People and had been a leader in efforts to desegregate the Kingsport schools and housing, we construe the allowance of punitive damages as tantamount to a finding of racial motivation at least on the part of the defendant City Manager Charles K. Marsh. The defenses of good faith action and qualified immunity interposed by the remaining defendants are not available to Marsh, and since we conclude the District Judge's findings of fact not to be clearly erroneous, the judgment as to him will be affirmed. However, a determination that the remaining defendants acted in good faith in the premises could provide a defense under the doctrine of qualified governmental immunity. *Pierson v. Ray*, 386 U.S. 547, 557 (1967); *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Nelson v. Knox*, 256 F.2d 312 (6th Cir. 1958). On remand, the District Court is instructed to make specific findings of fact and

conclusions of law as to this issue in compliance with Rule 52(a), Federal Rules of Civil Procedure.

Affirmed in part and reversed in part, and remanded for further proceedings not inconsistent herewith.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE NORTHEASTERN DIVISION

HORACE V. CURRY,

Plaintiff

v. Civil action no. 2501

FRED GILLETTE, ET AL.,

Defendants

MEMORANDUM OPINION

This is an action for money damages and injunctive relief, in which the plaintiff Mr. Horace V. Curry claims his lawful federal rights have been violated. This Court has jurisdiction under 28 U.S.C. § 1343, 42 U.S.C. §§ 1981, 1983, 1985, and tried the issues without a jury on March 8-10, 1971. Final proposals for findings of fact and conclusions of law were received by the Court on July 29, 1971.

At all pertinent times the defendant Mr. Fred Gillette was the duly elected mayor of Kingsport, Tennessee; the defendants Messrs. Richard E. Bevington, Charles B. Duke, IV, and John J. Cole and Dr. Elery E. Lay were duly elected members of the board of mayor and aldermen of such city; and, the defendant, Mr. Charles K. Marsh was the duly appointed and acting city manager of such city. Further, Mr. Curry was an ambulance operator certificated for two ambulances and a spare by Kingsport, Tennessee for the public convenience and necessity. Another operator certificated for such purpose was Tri-Cities Ambulance Service.

Tri-Cities discontinued its ambulance service in January, 1969 without notice, a fact which became known to the defendants mayor and aldermen on February 10, 1969. This

discontinuance of service resulted in Kingsport's being left with the availability of the two ambulances being operated by Mr. Curry, when it was estimated that six ambulances were required to serve the needs of the community. At that time, the Kingsport mayor and aldermen had an application for certification for this purpose of Mr. Wright S. Johnson, doing business as Metro Ambulance Service (Metro). Other prospective operators of this service requested a subsidy from the municipality, and the mayor and aldermen opposed granting a subsidy to any operator. It was eventually determined legislatively and administratively by the Kingsport municipal officials, however, that Metro should be certified for the operation of four ambulances upon Mr. Wright's qualification, and a certificate was issued to him on February 13, 1969.

Metro lost its lease on its operating-base premises on June 17, 1969. The defendant Mr. Marsh withheld approval of proposed substitute premises for that purpose; whereupon Mr. Wright requested the Kingsport authorities to allow him to conduct his base of operations from one of its fire halls on a temporary basis. The mayor and aldermen (except Dr. Lay) allowed Mr. Wright to utilize municipal property for this private enterprise purpose until February 20, 1970, when the City of Kingsport began providing an emergency ambulance service therein with leased equipment and municipal employees. When Metro moved into the fire station, a notice appeared in the Kingsport newspapers, stating Metro's name and telephone number in bold print, with instructions for persons requiring ambulance service to call such fire hall.

Metro encountered financial difficulties, and Mr. Wright requested the mayor and aldermen of Kingsport to grant him a subsidy of $400 per month. Mr. Curry made no such request at that time. The defendants mayor and aldermen, with the concurrence of the defendant city manager, adopted a

resolution on November 4, 1969, [1] authorizing the City of Kingsport, Tennessee to pay Mr. Wright an amount not to exceed $400 per month for the months of October-December, 1969. The resolution provided that these payments represented compensation to Metro for uncompensated services rendered indigent patients and was conditioned on Metro's allowing such City to audit its books and verify that the respective amounts paid Metro reimbursed it for services to indigents residing within that municipality, and that none of such payment should reimburse Metro for services rendered indigent patients residing outside Kingsport's limits until such time as Sullivan County, Tennessee cooperated [2] with the City of Kingsport, by acceding to the latter's request that the County pay a like amount to Metro for services to indigent patients residing outside the municipal limits of Kingsport.

Mr. Curry learned of these subsidy authorizations from a news report. He then applied to the defendant Mr. Marsh for a similar subsidy, and Mr. Marsh advised him that he did not qualify therefor and " * * * you won't get a subsidy. * * *" The following January, Mr. Curry billed the City of Kingsport for "unpaid ambulance bills for the year 1969: $2,837.00." On advice of the city attorney of such municipality, Mr. Marsh did not present such bill at the next meeting of the defendants mayor and aldermen.

---

[1] There is no merit to the defendants' claim that this action is barred by the applicable Tennessee statute of limitation, T.C.A. § 28-304. These payments were authorized and made within one year before the commencement of this action on March 16, 1970.

[2] The defendants mayor, aldermen and city manager had been negotiating an arrangement with Sullivan County, by which such city and such county would each pay such a subsidy.

Metro continued to experience financial difficulties, and on February 3, 1970, the defendants mayor and aldermen authorized further payments of $400 per month for January and February, 1970 by the City of Kingsport on the same conditions as before except for the requirement that Sullivan County make a similar payment. However, only $700 of the authorized amount was paid to Metro, because on February 17, 1970, the immediately aforenamed defendants learned that Metro planned to discontinue ambulance service three days afterward. On that latter date, the defendants mayor and aldermen authorized the City of Kingsport to provide emergency ambulance service as a governmental function. Subsequently, Sullivan County, Tennessee began providing emergency ambulance service as a governmental function.

All the while, after Metro began its operations, Mr. Curry's receipts from the operation of his ambulance service were reduced. As opposed to receipts of $1,933 in January, 1969, and $2,870 in February, 1969, Mr. Curry received only 16 calls and collected receipts of $215 in March, 1969. His further receipts in this period were:

1969

April	$600
May	215
June	235
July	75
August	215
September	50
October	50

Thereafter, according to Mr. Curry, his income had so reduced that he ceased keeping any specific records. [3] He testified that

[3] The plaintiff's proof of damages was sketchy.

he made two calls in the entire month of February, 1970 and three calls in the entire month of January, 1971, as examples. He asserted that this loss of business caused him mental anguish, and that he felt he had been "* * * legislated out of [the ambulance] business. * * *" It is undisputed that the ambulance equipment Mr. Curry had was completely adequate from every standpoint, and that the defendant city manager at no time had any complaints about the calibre of the ambulance service Mr. Curry was providing under his certificate.

It is the finding of this Court that the defendants violated the lawful federal right of the plaintiff Mr. Curry to the equal protection of the law. Constitution of the United States, Fourteenth Amendment. It is the conclusion of the trier-of-the-facts herein that the defendants mayor and aldermen discriminated against Mr. Curry by authorizing one certificated ambulance operator to use without cost a public facility for purpose of private enterprise and by encouraging members of the public to use the service, when a like privilege was not extended to Mr. Curry as another certified ambulance operator, and by making subsidy payments to one certificated ambulance service while not making it to Mr. Curry as another certificated ambulance operator. The only reason for such discrimination advanced by the defendants is that Mr. Curry offered a combined mortuary and ambulance service using the same facilities, equipment and personnel. Although Mr. Wright had separate establishments in separate communities, he also offered both mortuary and ambulance services.

Mr. Curry was not accorded the same treatment under the law in this situation as was accorded Mr. Wright. It is axiomatic that, in a democracy under a republican form of government, all persons are to be treated alike under the law. That the defendants may have acted in good faith and did not intend specifically to violate Mr. Curry's lawful federal rights is not a defense, *Pierson v. Ray* (1967), 386 U.W. 547, 557, 87 S. Ct. 1213, 18 L. Ed. (2d) 288, 296 [9], specific intent to violate

such rights not being a prerequisite to the defendants' liability herein, *Stringer v. Dilger*, C. A. 10th (1963), 313 F. (2d) 536, 540 [6].

42 U.S.C. § 1981 provides specifically that all persons residing within the jurisdiction of the United States shall have the same right in every state to the full and equal benefit of all laws for the security of property as is enjoyed by white citizens.[4] The federal civil rights acts were brought into being immediately after the War Between the States and were intended to confer equality in rights before the law in all respects for persons embraced within their provisions. *Basista v. Weir* C. A. 3d (1965), 240 F. (2d) 74, 86 [20]. The foregoing implementation by the Congress of the Constitution, Fourteenth Amendment, was accompanied by the remedy, that every person who, under color of any ordinance or usage of any state, subjects any citizen of the United States to the deprivation of any rights secured by the Constitution of the United States shall be liable to the party injured in an action at law, a suit in equity, or other proper proceeding for redress. 42 U.S.C. § 1983.

It is undisputed that the plaintiff Mr. Curry is a citizen of the United States, and that the defendants were acting herein under the color of an ordinance and usage of the state of Tennessee. Thereunder, Mr. Curry was subjected to the deprivation of a right secured to him by the Constitution, Fourteenth Amendment, to the equal protection of the laws; and, the defendants are liable [5] to the plaintiff herein.

---

[4] Mr. Curry is a member of the Negro race; Mr. Wright is a member of the Caucasian race.

[5] The actions of Mr. Marsh under color of state law as city manager in this episode render him liable along with his codefendants.

The plaintiff hereby is GRANTED relief. He will recover from the defendants compensatory damages of $9,668.50, punitive damages of $250, and $1,000 as a contribution toward the plaintiff's attorney fees herein, see *McArthur v. Pennington*, D. C. Tenn. (1963), 253 F. Supp. 420, 430 [6], an aggregate amount of $10,918.50. Rule 58, Federal Rules of Civil Procedure. As Sullivan County is now providing emergency ambulance service for the entirety of such county, the plaintiff is DENIED injunctive relief.

FILE:

/s/ C. G. Neese
United States District Judge

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-573

CHARLES K. MARSH, Petitioner

v.

HORACE V. CURRY, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX C

APPENDIX C

NO. 71-1886
UNITED STATES COURT OF APPEALS
FOR THE SIXTH DISTRICT

HORACE V. CURRY,
Plaintiff-Appellee

v.

ORDER

FRED GILLETTE, ET AL.
Defendants-Appellants

Filed August 14, 1972

Before: PECK and McCREE, Circuit Judges, and McALLISTER, Senior Circuit Judge.

Defendants-Appellants having filed a petition for rehearing with this Court, and this Court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be, and it is, hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins, Clerk

FILED
AUG 14 1972
JAMES A. HIGGINS, Clerk